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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

Written statement submitted by the American Association of Jurists, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement, which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[31 July 1997]

Introduction

1. The report by Mr. Joinet in his capacity as Special Rapporteur (E/CN.4/Sub.2/1997/20) makes significant improvements on the 1996 report. The main improvement concerns the fact that the idea of "reference period" has been abandoned, thereby recognizing that impunity is a phenomenon that can occur at any time and in any place. There are, however, still some shortcomings and omissions that need to be pointed out.

I. THE PRINCIPLES SET FORTH

2. Principle 1. The words "and every person" should be inserted after the words "Every people". The right to the truth must relate to the circumstances of all human rights violations, and not only a consistent pattern of gross violations or the perpetration of aberrant crimes. The relevant part of the text should thus read: "... which led to the violation of human rights", deleting the reference to a "consistent pattern of gross violations" and to "aberrant crimes".

3. Principle 2. There is not only the duty to remember but also the right to remember - which, besides the rejection of revisionist interpretations of objectively verified historical facts, includes the right to investigate and to publicize facts which have been concealed or distorted by the official version of history. The text should add: "The right to remember, which consists in the right to investigate and publicize facts which have been concealed or distorted, shall also be guaranteed."

4. Principle 3. Add the sentence: "The right to know the truth is imprescriptible."

5. Principle 4. The following text is proposed (so as not to suggest that taking appropriate action is a monopoly of the State and contingent upon the failure of the justice system to perform its functions): "Priority measures to give effect to the right to know the truth shall include establishing extrajudicial commissions of inquiry and ensuring the preservation of, and access to, the archives concerned. These are not only obligations of the State but a right of civil society."

6. Principles 5 to 12. While these principles attach great importance to extrajudicial commissions of inquiry, they do not mention four main aspects that would help a commission of inquiry to function effectively: (a) the obligation of the State to make all existing documentation available to the commission; (b) the power to search any place the commission deems appropriate; (c) the power to seize documents; and (d) the power to compel the appearance of witnesses by means of the forces of law and order and their legal obligation to testify. These four points should be incorporated into the principles relating to the commissions of inquiry. Thus, principle 9 (a), which states that the appearance of witnesses is voluntary, should be deleted. If such appearance is voluntary, it is most unlikely that a person suspected of having committed violations would attend a commission of inquiry. There is also no mention in principles 5 to 12 of the possibility of setting up an international commission of inquiry, as in the case of El Salvador. A sentence to that end should be included. Principle 11 would allow the commissions to make recommendations, but this goes beyond the terms of reference of a commission of inquiry and is more a matter for the popular organizations, political parties and organs of the State. Principle 11 should be deleted.

7. Principle 13. Third countries in possession of archives should not be "invited" to restore them, but must have the obligation to do so. Instead of "Third countries ... are invited to cooperate", the sentence should read: "Third countries ... shall cooperate". The last sentence, after the words "misappropriation of archives", should read: "or their destruction with a view to preserving the impunity of the violators, or misappropriation of archives with a view to negotiating payment for them".

8. Principle 14. The first sentence should read: "Measures shall be taken to place each archive centre under the responsibility of a specifically designated person or commission" (adding the words "or commission").

9. Principle 15. The cooperation of third countries in possession of archives must be obligatory. The text should therefore read: "including those held in third countries, which shall cooperate to this end".

10. Principle 16. The first sentence should be expanded to read: "Access to archives shall be facilitated, in the interests of the victims, their relatives and legal representatives, and of historical research ...".

11. Principle 20. The last sentence should be replaced with the following: "Any person or institution having reliable knowledge of the facts shall be able to institute criminal proceedings by filing a complaint." The requirement that a non-governmental organization filing a complaint must show proof of long-standing activities for the protection of the victims concerned has no legal basis whatsoever. In the exercise of the public right of action, what matters is not the "curriculum vitae" of the complainant, but the seriousness, accuracy and credibility of the complaint.

12. Principles 21 to 25. The conditions for the intervention of a foreign court are formulated in very vague terms, yet there are clearly established principles both in international law and in domestic law: (a) in international law, the principle of universal jurisdiction is established in international treaties; and (b) in domestic law, a derogation from the principle of the territorial application of the criminal law may be made when, although the violation has occurred outside a State's territory, the perpetrator or the victim is a national of that State. In particular, principle 25 ("States may take ... measures in their internal legislation to establish extraterritorial jurisdiction") may lead one to think that the principle allows the court of one country to try an alien for offences alleged to have been committed outside the territory of that country, without a treaty establishing universal jurisdiction and without the victim or the perpetrator being a national of the State of the court claiming jurisdiction. Furthermore, principle 25 may give the impression that it authorizes a State to abduct a person on foreign soil in order to try him in its own courts (case of the Mexican Alvarez Machain, brought before the Inter-American Commission on Human Rights: American Association of Jurists v. United States). The jurisdiction and rules of procedure of an international criminal court will be specified by the international instrument establishing the court. It is obvious that the court will respect the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Accordingly:

(a) The last sentence of principle 21 should be deleted;

(b) Principle 22 should be deleted as it is superfluous;

(c) Principle 23 should be amended to read: "... establishing a rule of extraterritorial jurisdiction under the international law in force";

(d) Principle 25 should be deleted.

13. Principle 34. Ordinary offences committed by military personnel - and not only serious human rights violations - must come under the jurisdiction of

the ordinary courts. It is therefore suggested that the last clause of principle 34, beginning with the words "excluding human rights violations ...", should be deleted.

14. Principle 35. The principle of the irremovability of judges is a fundamental achievement of the constitutional State. However, it is not absolute: judges may be removed from office on the grounds specified and following the procedures established in the Constitution and the law. An international declaration of principles cannot propose remedying one form of arbitrariness - according to a non-existent principle of parallelism - with another form of arbitrariness. Principle 35 should therefore be deleted.

15. Principle 36. The obligation to make reparation must be a joint and several obligation of the State and of the direct perpetrator or perpetrators, accomplices and accessories to the violations. It is therefore suggested that the text of this principle should be amended to read: "Any violation of a human right shall entitle the victim and/or his beneficiaries to claim reparation jointly and severally from the State and from the perpetrators, accomplices and accessories to such violations".

16. Principle 37. The words "or their beneficiaries" should be inserted after the words "all victims".

17. Principle 43. The text should be amended to read: "Whether or not the perpetrators of disappearances have been identified, prosecuted and tried, there exists the imprescriptible obligation to elucidate the fate of the victims and to inform the families. Should the victim have died, the body shall be returned to the family as soon as it has been identified".

18. Principle 50. The last sentence should be deleted for the reasons given with reference to principle 35.

II. PRINCIPLES TO BE ADDED

19. The following principles should be added:

(a) The judiciary must be independent and impartial. There must be no special courts or ad hoc tribunals. The independence of the judiciary from the administrative power must be stipulated and guaranteed in the Constitution and respected in practice. The conformity of judgements with the law implies their conformity with the fundamental norms of international human rights law. The independence and impartiality of the justice system must also be guaranteed by the publicity of proceedings and judgements. Judges and lawyers must be free from any pressure, threats or persecution;

(b) The prosecution service must be independent from the administrative power;

(c) Efforts must be made to promote the universalization and refinement of international norms, instruments and mechanisms. This means that:

(i) All States must sign and ratify the covenants, protocols and conventions and must recognize the competence of the committees to receive complaints, where this is provided for by the covenants;

(ii) Optional protocols to the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the International Covenant on Economic, Social and Cultural Rights must be elaborated and adopted to establish complaints procedures;

(iii) The existing procedures within the United Nations system and in the regional systems must be improved with a view to ensuring effective protection of human rights;

(d) Freedom of the press must be guaranteed. Freedom of the press entails democratic and transparent management of the media and the obligation to report objectively and impartially. The dissemination of false information constitutes a violation of the right to receive information, as enshrined in article 19 of the Universal Declaration of Human Rights;

(e) Lastly, the following are prerequisites for dealing with impunity:

(i) The democratization of society in political, economic, social and cultural terms;

(ii) Popular participation, by which is meant the active and conscious involvement of individuals and groups in taking decisions on all matters affecting them directly or indirectly, in defining goals and means of achieving them, and in implementing the decisions taken and evaluating the results; and

(iii) Observance of the right of peoples to self-determination.

20. In addition, principles relating to extraterritorial or transboundary violations of human rights should be included. The report ignores the question of impunity for transboundary or extraterritorial violations of human rights committed by a State or its agents in the territory of another State through armed aggression, infiltration of agents to commit murder or acts of terrorism, promotion of coups d'état, etc. It also fails to mention the question of impunity for human rights violations committed during colonial or neocolonial wars against various peoples. Nor does the report deal with the question of impunity for human rights violations committed in the course of operations authorized by the United Nations Security Council (international human rights violations, for example, in Somalia or during the Gulf War). Consequently, the report does not address the issue of reparation (moral and material) for the victims of transboundary and international violations of human rights.

21. The following principles should therefore be added to those contained in the report:

(a) The principles laid down in this set of principles and the principles relating to the international responsibility of States apply to cases of extraterritorial or transboundary violations of human rights;

(b) The principles laid down also apply to violations of human rights which are committed in the course of operations carried out or authorized by the United Nations. Such violations create responsibility on the part of the United Nations and of the persons who committed them and/or of those who authorized the violations or who failed to prevent them when they could have done so. The United Nations has the obligation to compensate the victims and/or their beneficiaries and must ensure that those responsible are brought to justice in the country of their nationality or pursuant to the principle of universal jurisdiction.